Petition

81-1601

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IN THE

Supreme Court of the United States

No. .....

James Warren Irwin, Jr.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Did the Trial Court Err in Failing to Grant a New Trial When it Was Learned, in a Post-Trial Hearing, that the Chief Government Investigator, as Well as Major Government Witnesses at Trial, Stood Silent as Another Major Government Witness Perjured Herself in His Presence and When He Knew or Should Have Known of Said Perjury.

Did the Trial Court Err in Failing to Grant a New Trial When it Was Learned During Post-Trial Discovery that Several Statements Made by the Chief Government Investigator and Major Government Witness During a Post-Trial Hearing Were Inconsistent With Actual Documentation Provided by the Law Enforcement Agency With Whom He worked.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

This is a criminal case. The judgment of the Court below was issued November 20, 1981, per order of that Court issued the same day. A petition for rehearing was timely filed and said petition was denied on December 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C §1254 (1).

OPINION BELOW

The Court of Appeals issued its opinion below on November 20, 1981. (Appendix A). The Court of Appeals issued its denial of Petitioner's petition for rehearing on December 30, 1981 without written opinion. (Appendix B).

STATUTES INVOLVED

No particular constitutional provisions, treaties, statutes, ordinances or regulations are at issue in the questions presented for review.

STATEMENT OF THE CASE

Petitioner, James Warren Irwin, Jr., was originally indicted in an eleven (11) count indictment for violations of 21 U.S.C.A. §841(a)(1) and 21 C.F.R. §1306.04(a). Prior to trial, the Government dismissed one count of the indictment. Following the jury trial which began on September 3, 1980, Petitioner was convicted of six counts.

On December 15, 1980, the trial court granted Petitioner's motion for new trial on four of the six counts of the indictment granting leave for the Petitioner to file additional motions for new trial on the remaining two counts. On February 17, 1981, the trial court denied Petitioner's motion for new trial on the remaining two counts. On February 25, 1981, the Government moved to dismiss the four counts on which the court had previously ordered a new trial. The court ordered that these four counts be dismissed. Also, on February 25, 1981, Petitioner was sentenced on the remaining two counts of the indictment and received eighteen months imprisonment and a fine of five thousand ($5,000.00) dollars on one count and eighteen

months imprisonment as to the other count, the sentences to run concurrently.

Each of the two counts on which Petitioner stands convicted alleged that on certain dates the Petitioner did knowingly, intentionally and unlawfully dispense and distribute certain amounts of tablets of preludin, 75 milligrams each, a Schedule II non-narcotic controlled substance containing phenmetrazine to Tom Edward James pursuant to subscriptions which he knew were not issued in the usual course of medical practice for legitimate medical purposes. (Trial S/F 266, 267). The evidence adduced at trial to support the allegations came basically from two sources: Department of Public Safety Agent John Hitt and Tom James.

James testified that for approximately sixteen months he had been going to various doctors known as "preludin doctors" in order to obtain prescriptions for the drug, preludin. (Trial S/F 502, 503). James asserted that he would take them to the Petitioner's pharmacy in Longview, Texas, to get them filled. (Trial S/F 503). James stated that when he first took the prescription to the Petitioner, the price to fill the prescription was approximately $18.00. (Trial S/F 504). He then stated that the price went up to $30.00 or $40.00 whenever his visits became more frequent. (Trial S/F 504). James then admitted that he had been selling the pills on the street and was, in fact, a preludin dealer. (Trial S/F 505). According to James, he could have had the prescription filled at other places but that the Petitioner "didn't question me as much as the rest of them would." (Trial S/F 506).

Through the corroborative testimony of Agent John Hitt,

it was developed that several prescriptions for preludin in the name of Tom James were passed at Petitioner's pharmacy in a relatively short period of time. (Trial S/F 162, 163). According to Hitt, this fact evidenced the allegation that the Petitioner was filling prescriptions which he knew were contrary to the usual course of medical practice or for legitimate medical purposes. Hitt then acknowledged that as Chief Investigator on this particular case, he was the most knowledgeable person about this. (Trial S/F 172). Hitt also testified that he could corroborate with James on Counts VIII and IX, but that the jury would have to believe James on the other counts of the indictment pertaining to him, (Counts I through III), without corroboration. (Trial S/F 166, 170, 171, 175, 176).

Royce Jackson, a professional pharmacist called as a witness for the Government, testified that it is not required by law and usually a pharmacist does not have time to check his records to determine if a person had presented a similar prescription in the recent past. (Trial S/F 473, 474). Based upon this testimony of Jackson, the only testimony relating to the facts and the law applicable to Counts VIII and IX came from James and Hitt.

QUESTION NUMBER ONE

Did the Trial Court Err in Failing to Grant a New Trial When it Was Learned, in a Post-Trial Hearing, that the Chief Government Investigator, as Well as Major Government Witnesses at Trial, Stood Silent as Another Major Government Witness Perjured Herself in His Presence and When He Knew or Should Have Known of Said Perjury.

The Government's efforts at trial in connection with the

counts on which the Petitioner stands convicted, were dedicated to establishing, through the testimony of Tom James, that James had prescriptions filled at Petitioner's pharmacy, and through the crucial corroborative testimony of Agent John Hitt, that the prescriptions were being improperly filled. Although nothing came to light as to Agent Hitt's credibility during the actual trial of the case, subsequent thereto a hearing was conducted in connection with Petitioner's motion for new trial.

At the post-trial hearing on October 9, 1980, it was learned that Agent Hitt sat silently by as a major Government witness, Janice Godfrey, perjured herself concerning monies received from Hitt for information she provided. The trial court determined that this perjury warranted a new trial on the counts involving Janice Godfrey, and a new trial was so ordered on these four counts. (See Appendix C, C-2d).

Pursuant to the evidence adduced at the post-trial hearing, Petitioner was granted a motion for post-trial discovery by the trial court. The discovery resulted in the production by the Government of official documents which contradicted the sworn testimony of Agent Hitt. It was the contention of the Petitioner that Agent Hitt's credibility had been placed in serious jeopardy, and that because of the importance the Government placed on his testimony at trial in corroboration of Tom James, a new trial should have been granted as to all counts.

At trial, Government witness Janice Godfrey testified, on cross-examination by defense counsel, that she had never received any monies from any Government Agency other than those she received to make undercover purchases of

prescription drugs at the Petitioner's pharmacy. Agent John Hitt of the Department of Public Safety was present in the courtroom at the time these statements were made and remained completely silent when Godfrey answered the question as she did. It was established at the trial and throughout the testimony that Agent Hitt was the Chief Investigator involved in the case and that he had been integrally involved in the prosecution of the case from the outset.

It was not until a post-trial hearing, after the jury verdict of guilty on six counts, that Agent Hitt testified that certain monies were paid to Janice Godfrey "for being an informant." (Trial S/F 10, 11). In its order granting Petitioner's motion for new trial on the four counts involving Janice Godfrey, (Appendix C), the trial court found that Godfrey had indeed perjured herself and that Agent Hitt, as a member of the prosecutorial team, had a duty to correct the false testimony of a Government witness whenever that evidence appeared. *United States* v. *San Filippo*, 564 Fed.2d 176, 178 (5th Circuit, 1977). As the trial court noted, "that duty was completely disregarded in this case." (Appendix C, C-3).

While the trial court applied this duty to the circumstances surrounding the testimony of Janice Godfrey, it did not apply the Government's failure to bring forward the truth to issues surrounding the allegations connected with Tom James. The Court of Appeals also failed to apply this issue of credibility to the trial as a whole.

Petitioner contends that, had the jury had an opportunity to know that Agent Hitt failed to bring forth the perjury of Janice Godfrey, it would have had a severe impact upon the

credibility and belief the jury gave to his corroboration of Tom James. Obviously, had this fact come to light during the pendency of the jury trial, it could have been used in the presence of the jury. However, Petitioner submits that because neither the perjury nor Hitt's failure to bring forward same came to light until after trial, he has been penalized by both the trial and Court of Appeals.

Both the trial court and the Court of Appeals point to the fact that there was nothing brought forth during the trial to impeach Hitt's credibility in so far as Tom James was concerned. Petitioner's position is that Agent Hitt's testimony was crucial to corroborate that of Tom James, and the post-trial discovery that Hitt had been less than open and truthful, if presented to the jury, would have had a significant bearing on the outcome of the trial court.

In support of its conclusion that the testimony of Agent Hitt was not crucial to corroborate Tom James, the Court of Appeals stated that:

> "Irwin filled six different preludin prescriptions for James (four from different doctors) over a three month period for a total of more than double the amount of preludins which could have been legitimately prescribed over that period. There is no question that Irwin knew who James was, both by name and by face, since they both had known each other for approximately 25 years, having grown up in Tatum, Texas." (Appendix A, A-3).

What the Court of Appeals did not point out was that on two other occasions during this three month period, James had preludin prescriptions filled by at least two other pharmacists at Petitioner's store. The court went on to

assert, incorrectly, that none of this information depended upon Agent Hitt's credibility. Petitioner contends that all of this information depended upon Hitt's corroboration of James, as well as his credibility.

There was testimony throughout the trial, including the testimony elicited from Agent Hitt, that there was no legal requirement of any pharmacist to check his records to ascertain the last date on which a specific patient received a certain prescription. In spite of this, Agent Hitt continued to testify that the better practice of keeping up with each prescription was to keep track of who received it and require the showing of a drivers license when filling a prescription for a controlled substance. Although there is no legal requirement for a pharmacist to take the steps suggested by Hitt, Petitioner contends that his testimony had the effect of creating an impression on the jury that this was, in fact, a legal requirement.

Without Hitt's testimony and his introduction into evidence of the prescriptions which were filled by the Petitioner over that three month period, as well as his explanation of the duties pharmacists should be expected to adhere to, Tom James' testimony on these matters would have been meaningless. As the record well shows, the jury had an opportunity to believe the uncorroborated testimony of Tom James in three different counts of the indictment and chose not to do so. Even Agent Hitt testified that he could corroborate Tom James on two counts, but the jury would have to believe Tom James on the other three counts. (Trial S/F 166–176).

Petitioner contends that the failure of the prosecutorial team to bring forward the perjured testimony of Janice

Godfrey is no less severe than the perjury itself. Petitioner further contends that the impact this knowledge would have had on the jury would have been the same, and it is entirely reasonable and likely that this knowledge would have affected the judgment of the jury. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio* v. *U.S.*, 405 U.S. 150 (1972). As this Honorable Court held in *United States* v. *Agurs*, 427 U.S. 97 (1976), a strict standard of materiality should be applied in cases such as this because they involve a corruption of the truth seeking function of the trial process. No conviction based upon the knowing use of perjured testimony is fair. In fact, it is fundamentally unfair, and a new trial must be granted whenever there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Agurs*, 427 U.S. at 103.

The procedural and constitutional safeguards envisioned and applied by this court are effectively nullified if the logic and reasoning used by the trial court and the Court of Appeals is sanctioned. These courts have essentially held that Agent Hitt's failure to bring forth the perjured testimony was applicable only to those counts which involved Janice Godfrey. Since there is nothing in the trial record to indicate that Tom James actually lied or that Agent Hitt failed to bring forward any untruthfulness of Tom James, the courts below have reasoned that his testimony in so far as James is concerned should be viewed as credible. This reasoning ignores the principles of fundamental fairness espoused by this court in *Napue* and *Agurs*. No one knows on what basis the jury decided to convict this Petitioner on the two counts involving Tom James. It is very reasonable and likely to assume that had the jury known that Agent Hitt had failed to bring forth the perjury of Janice Godfrey whenever it occurred, it could have effected their verdict on all counts, not just those involving Godfrey.

This is the standard by which this case should have been decided. It should not have been decided on conjecture and speculation as evidenced by the opinion of the Court of Appeals. Under the circumstances of this case, and under the foregoing authorities, Petitioner contends that the trial court erred in failing to grant a new trial and that the Court of Appeals erred in failing to reverse the conviction.

QUESTION NUMBER TWO

Did the Trial Court Err in Failing to Grant a New Trial When it Was Learned During Post-Trial Discovery that Several Statements Made by the Chief Government Investigator and Major Government Witness During a Post-Trial Hearing Were Inconsistent With Actual Documentation Provided by the Law Enforcement Agency With Whom He Worked.

On October 9, 1980, an oral hearing was had on Petitioner's motion for new trial. (Trial S/F 3). During this hearing, the perjury of Janice Godfrey, a chief Government witness, came to light when Agent John Hitt testified that he had paid her sums of money for her work as an informant. (Trial S/F 11). As previously noted, as a result of this perjury, Petitioner was granted a new trial on four of the six counts on which he was convicted. These four counts all involved the testimony of Janice Godfrey. Subsequently, the Government filed a motion to dismiss all four counts and the court ordered their dismissal accordingly. (Trial S/F 87). In addition to granting Petitioner's motion for new trial on the four counts involving Janice Godfrey, the court ordered the Government to provide the Petitioner with "all information known and readily obtainable through due diligence concerning any cash payments or other benefits which may

have been provided to Tom James, Janice Godfrey, or any other person who testified as a witness at Defendant's trial by any law enforcment personnel or cooperating agents." (Trial S/F 96). On December 23, 1980, the Government filed its response to the court's order for further discovery and included various letters and documents which were retrieved from the records of the Texas Department of Public Safety concerning monies paid to Janice Godfrey by the Department of Public Safety for her cooperation and testimony. (Statement of Facts — Trial S/F 64–76).

These documents, produced pursuant to the court's order for further discovery, categorically contradict the sworn testimony of Agent John Hitt at the post-trial hearing on October 9, 1980, and cast serious questions upon his credibility as a witness at the trial of Petitioner.

Among the documents produced by the Government were certain investigative expense reports which set out and described certain cash payments made to Janice Godfrey. One of these reports described a payment made to government witnessk Janice Godfrey, in the amount of $200.00. (Trial S/F 75). According to the "justification" on the report, the $200.00 was expended "... for information used as evidence in trial." (Trial S/F 75). The date of payment reflected in the report was September 10, 1980. (Trial S/F 75). This was also the date of the conclusion of the trial of Petitioner. (Trial S/F 217). This report or voucher goes on to say parenthetically, "See Nar-2, dated 09-15-80 by Investigator Hitt for *details*." (Trial S/F 75) (Emphasis Added) This "Nar-2" report states that Godfrey "gave Investigator Hitt new information about illegal prescriptions filled by pharmacist James Warren Irwin, Jr.," and under the heading "Details," the report goes on to state: "This evidence

was used in trial against James Warren Irwin, Jr. and on 09-10-80, Irwin was found guilty ..." (Trial S/F 76). The date of this "Nar-2 report," 09-10-80, is the date on which the $200.00 payment was made to Janice Godfrey. (Trial S/F 75).

At the October 9, 1980 hearing, when first questioned about the reason for the payments to Godfrey, Hitt testified as follows:

Q. "It was money that was paid to her for being an informant, was it not?"

A. "As I just got through saying, on each occasion she went I gave her I think it was $20.00 for gas and car use, and then later I gave her the bulk of that money for being an informant, yes."

(Trial S/F 11).

However, under questioning by the prosecuting attorney, he testified somewhat differently:

Q. "Janice Godfrey worked with you not just on James Irwin, but gave you information on other persons, as well?"

A. "She worked for me for about nine months, and this $270.00 or $260.00, whatever it is, was over about a nine-month period."

Q. "She made expenditures in that work for you as a confidential informant?"

A. "Yes, sir."

Q. "And was this money used to reimburse her for those expenditures?"

Q. "Yes, sir."

(Trial S/F 15, 16)

On redirect by defense counsel, he stated:

Q. "You're saying that the $260.00 that you're talking about was reimbursement of monies that she spent?"

A. "Yes, sir. I don't know that she spent that exact amount. What I'm saying is I gave her that money to reimburse her for her expenses and for her time."

(Trial S/F 16)

Finally, still on redirect by defense counsel, Agent Hitt offered yet another explanation:

A. "The money that was paid to her after the trial was to help her move because she received many threats on her life."

Q. "Is that included in the $200.00 you're talking about?"

A. "Yes, sir, that's included in that amount."

Q. "Prior to that time — — well, approximately how much was that? That's been recent. How much of the $200.00 was that?"

A. "The bulk of it."

Q. "It was just recently. Isn't it something you can remember.?"

A. "Approximately the $200.00."

Q. "Okay, so then you're saying that prior to since the trial she hadn't been paid anything except — — —?"

A. "No, what I said was during the process of this whole time that she's worked for me, approximately nine months, she's been paid approximately $260.00 or $270.00."

Q. "The bulk of that has been since the trial?"

A. "Yes, sir."

(Trial S/F 18, 19)

In addition, Hitt was questioned about the time the payment was made, and, as the trial court points out in its order, (Appendix C, C-51), his testimony was "somewhat inconsistent" here as well. He first stated that the $200.00 was paid to Janice Godfrey after the trial and then, as the excerpts above indicate, he stated that they had been made over a nine month period, leaving the inference that some recent payments had been made.

The documentation provided by the Government, pursuant to the court's order, verifies the original version of Agent Hitt's testimony. The record clearly demonstrates the $200.00 was justified as an expense to Godfrey *"for information* used as evidence in trial ..." (Trial Tr. 74) (Emphasis Added) There is no indication of any kind that the money was used for any other purpose. In addition, the

record indicated Godfrey provided Hitt with "new information" concerning the Petitioner on September 2, 1980, the day before the trial. (Trial Tr. 76). As the document indicates, the information was used at trial. The $200.00 payment was made on the day of the verdict, September 10, 1980. (Trial Tr. 217). This, in view of the report which states that the payment was "for information" seems to indicate that Godfrey was paid $200.00 for the "new information." In any case, the documents clearly contradict Hitt's testimony.

Although the Court of Appeals concluded that the above documented records were not inconsistent with Hitt's testimony at the hearing, Petitioner strenuously urges this court to examine the physical documentation in light of Hitt's statements. There is nothing consistent about the statements which first described the money as payment "for being an informant" and later described it was being money paid "to reimburse her for expenses." Paying someone for information is fundamentally different from reimbursing someone for an expense. Moreover, the Court of Appeals incorrectly stated that the Government records indicate "only" that the money was paid "for information." (Appendix A, A-5 f.n.6). The records themselves indicate that the money was paid for "new information" leading to the conviction of James Warren Irwin, Jr. Petitioner suggests that Agent Hitt was untruthful in his explanations about these payments as the inconsistent statements and reports so document. The reasons and motives for his decision to make these statements, as well as his silence during the perjury of Janice Godfrey, place his credibility in serious jeopardy, and Petitioner contends that if these facts were brought to the attention of the jury, there is a reasonable likelihood that it could have affected the jury's verdict in this cause.

Petitioner submits that rather than speculate on the motives of Agent Hitt, his frame of mind or intent, and rather than rely on conjecture as the Court of Appeals did in justifying Hitt's actions, the circumstances presented here should be viewed in the perspective of the jury and the context in which they were presented information by Agent Hitt and the Government.

Although Godfrey and James were definitely crucial witnesses in the Government's case, Hitt was the paramount witness. It was Hitt who set the stage for the informant's testimony. It was Hitt, as a law enforcement officer, who established credibility and lent credibility to the testimony of the Government's informant. It is crucial to keep in mind that in each count of the indictment wherein the jury was left to believe one of the informants without the corroboration of Hitt, the Petitioner was acquitted. Petitioner was convicted only on those counts to which Hitt's testimony corroborated the statements of the informants. Petitioner submits that had this jury had the opportunity to view Hitt in a different and less credible light, it is entirely reasonable, if not probable, that the verdict would have been different. *Agurs*, 427 U.S. at 103.

CONCLUSION

The integrity of the truth seeking function in the trial process has been corrupted in the instant case. Petitioner respectfully urges this honorable court to review the matters presented herein and grant Petitioner's petition for writ of certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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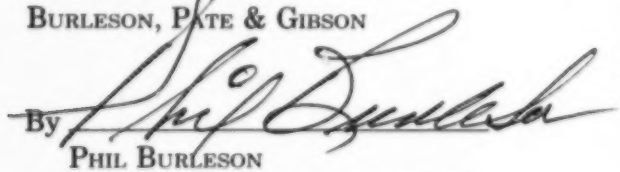
MICHAEL D. MCKINLEY
BURLESON, PATE & GIBSON

By 
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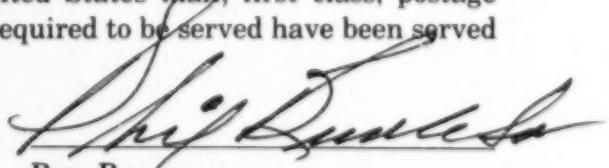
PROOF OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the United States mail, first class, postage prepaid. All parties required to be served have been served herewith.



PHIL BURLESON

Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Warren IRWIN, Jr.,
Defendant-Appellant.

No. 81-2088.

United States Court of Appeals,
Fifth Circuit.

Nov. 20, 1981.

Defendant pharmacist was convicted before the United States District Court for the Eastern District of Texas, William Wayne Justice, Chief Judge, of unlawfully dispensing Preludin, a controlled substance, and he appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) prosecutor's failure to disclose payments of $60 to $70 to informant did not require new trial absent showing that disclosure might have affected outcome of trial; (2) instructions as to requirements of other state and federal laws regarding proper form and contents of a prescription were not objectionable as authorizing jury to convict for offenses not specified in the indictment and were not so confusing as to mislead jury into doing so; and (3) even if investigator's testimony creating impression that defendant was only part of a widespread and possibly related scheme or problem was prejudicial, reversal was not required where such was elicited by defense counsel in attempt to establish basis for claim of "selective prosecution."

Affirmed.

1. Criminal Law 919(1)

Brady doctrine requires a new trial when the prosecution has withheld exculpatory information from the defense.

2. Criminal Law 627.8(6), 700

For *Brady* purposes, three distinct situations involving nondisclosure of evidence by the prosecution have been identified, the first occurring when undisclosed evidence revealing that the Government's case contained perjured testimony, the second occurring when the defense makes a specific request for material which is not complied with and the third occurring when either a general request for all exculpatory material has been tendered by defendant or when there has been no discovery request at all.

3. Criminal Law 919(1)

Brady doctrine, which requires new trial when prosecution has withheld exculpatory information on request, applies even though the evidence in question relates solely to the credibility of an important government witness.

4. Criminal Law 919(1)

Although prosecutor's failure to respond to a specific defense request for exculpatory information is seldom, if ever, excusable, a new trial does not automatically result.

5. Criminal Law 919(1)

To obtain a new trial based on Government's noncompliance with specific request for exculpatory material, defendant must show that the suppressed evidence might have affected the outcome of the trial.

6. Criminal Law 1171.1(1)

Although in responding to defense request for specific information as to payments to informant the prosecution did not reveal payments of approximately $60 to $70 as reimbursement for expenses, such did not require reversal on *Brady* grounds as informant's misstatement on the stand was relatively insignificant, probably unintentional and perhaps not even heard as such by drug investigator and small point that might be scored by questioning investigator about his failure to reveal untruth in informant's testimony would not be sufficient either to impeach investigator or affect the result and evidence supporting finding of guilt was not dependent on assessment of investigator's credibility.

7. Criminal Law 1038.1(2)

Where defendant objected to instructions on state drug requirements but failed to do so with regard to those relating to federal requirements reviewing court could reverse conviction based on inclusion of the latter only if such constituted "plain error." Fed.Rules Cr.Proc. Rule 52(b), 18 U.S.C.A.

8. Criminal Law 822(6)

In determining whether challenged instructions might have led jury to convict on grounds not charged in the indictment, the trial court's instructions were not to be dissected word by word and line by line but were to be construed as a whole.

9. Drugs and Narcotics 132

In prosecution of pharmacist for unlawfully dispensing controlled substance, jury instruction detailing require-

ments of other state and federal laws regarding proper form and contents of prescriptions, with trial court apparently believing that evidence showing that pharmacist filled prescriptions not in proper form was relevant to main issue of whether he knowingly filled prescriptions for Preludin that he knew were not for legitimate medical purpose did not authorize jury to convict for offenses not specified in indictment and were not so confusing as to mislead jury into doing so. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

10. Criminal Law 1169.5(1)

An instruction to disregard challenged testimony is sufficient unless the remark is so highly prejudicial that it is incurable by the admonition.

11. Criminal Law 730(3)

Instruction to disregard cured any impropriety in question implying that about 80 witnesses had testified before indicting grand jury, especially as stipulation that only one individual testified before the grand jury made the truth evident.

12. Criminal Law 1037.1(2)

Fourteen references to "preludin doctors" and "preludin pharmacists" during five-day trial of pharmacist for improperly dispensing such drug, all such references being without objection, did not constitute such plain error so as to warrant reversal. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1); Fed.Rules Cr.Proc. Rule 52(b), 18 U.S.C.A.

13. Criminal Law 1137(5)

Even if drug investigator's testimony implying that defendant pharmacist was only part of a widespread and possibly related scheme or problem in improper dispensing of drug Preludin was prejudicial, it did not require reversal as such testimony was elicited by defense counsel in attempt to establish basis for claim of selective prosecution. Comprehensive Drug Abuse Prevention and Control Act of 1970, §401(a)(1), 21 U.S.C.A. §841(a)(1).

Appeal from the United States District Court for the Eastern District of Texas.

Before GEE and RUBIN, Circuit Judges, and SPEARS*, District Judge.

ALVIN B. RUBIN, Circuit Judge:

A pharmacist appeals from his conviction on two counts of unlawfully dispensing Preludin, a controlled substance, outside the usual course of medical practice. We find his challenges to the jury instructions and the prosecution's remarks during trial without merit. We also conclude that the district court did not err in denying his motion for a new trial based on his post-trial discovery that a state agent whose efforts initiated the prosecution and who testified at trial had not corrected the misstatement of another government witness because, even if this had been known, it would not likely have changed the result. Accordingly, we affirm.

---

*District Judge of the Western District of Texas, sitting by designation.

I.

James Irwin, the appellant, is a registered pharmacist who owns and operates a pharmacy in Longview, Texas. As the result of a routine investigation, John Hitt, an investigator for the Texas Department of Public Safety, became suspicious that Irwin was illegally dispensing Preludin, *i.e.*, that Irwin was filling prescriptions for Preludin that he knew were not issued in the usual course of medical practice for a legitimate medial purpose.

His suspicions thus aroused, Hitt enlisted Janice Godfrey, whom he knew to be a Preludin dealer, as an informer in exchange for a promise of immunity. Godfrey described to Hitt her past transactions with Irwin and, in accordance with Hitt's instructions, made three additional purchases of Preludin from Irwin using forged and, in some instances, facially invalid prescriptions. Hitt electronically eavesdropped on the conversations which ensued between Godfrey and Irwin during these three transactions and recorded the final one.

Hitt also enlisted as an informer Tom James, another person whom Hitt knew to be a Preludin dealer. While James did not, as Godfrey had done, make any additional purchases of Preludin under Hitt's surveillance, he did describe to Hitt his past dealings with Irwin. James related that Irwin filled many Preludin prescriptions for him and that Irwin had also on three occasions sold James amounts of Preludin above and beyond the quantities called for in the prescriptions then being filled.

On the basis of this information and other evidence, Irwin was indicted on eight counts of unlawfully dispensing a Schedule II controlled substance, Preludin, pursuant to

prescriptions that he knew were not issued in the usual course of medical practice for a legitimate medical purpose, in violation of 21 U.S.C. §841(a)(1) and 21 C.F.R. §1306.04(a), and three counts of unlawfully distributing Preludin, not pursuant to any prescription, in violation of 21 U.S.C. §841(a)(1). Four of the "unlawful dispensing" counts involved delivery of Preludin to Godfrey, and the other four "unlawful dispensing" counts and all three "unlawful distribution" counts involved delivery to James.[1]

Godfrey, James and Hitt were the major government witnesses at trial. Godfrey testified in general about her dealings with Irwin and specifically about the three occasions when she bought Preludin from Irwin pursuant to hitt's instructions.[2] During her cross-examination, the following dialogue occurred:

> Q. The money that you were given [by Hitt] to buy drugs, is that the only money that was given you by any law enforcement agency any time up to the present?
>
> A. Yes.

This answer was in fact untrue; Hitt had given Godfrey $60 to $70 prior to trial for expenses.[3] Hitt, however, was not asked about any payments he might have made to Godfrey.

---

1. One of the "unlawful dispensing" counts involving James was dismissed prior to trial.

2. The substance of Godfrey's testimony is not related here because Irwin's appeal is only from his conviction on two counts of "unlawful dispensing" involving delivery to James. *See* text and note at note 4 *infra*.

3. Hitt also gave Godfrey another $200 at the end of trial.

Hitt, during his testimony, related the background facts of his initial routine investigation of Irwin's pharmacy. He said that he first became suspicious of Irwin when he noticed what seemed to be an inordinately large number of Schedule II prescriptions being filled by Irwin, that many of the prescriptions were for people whom Hitt knew or suspected to be drug dealers, and that Irwin acted nervously during Hitt's visits. Hitt told of his recruitment of Godfrey and James as informers, and what he had overheard of the secretly recorded conversations between Godfrey and Irwin during Godfrey's three directed purchases of Preludin.

James testified that he had originally been given a prescription for Preludin to help him lose weight. He soon learned, however, that he could sell Preludin tablets for $10 to $15 each, so he began going to doctors who would give him prescriptions. He would then take these prescriptions to Irwin's pharmacy to be filled. James stated that when he first started taking the prescriptions to Irwin, he was charged $18 for thirty 75 milligram tablets, but, after he began buying Preludin frequently, Irwin told him, "You must be selling them," and "They're going out on the street selling them, so we're going to change to $1 to $1.50 apiece." Thereafter, Irwin charged James from $30 to $40 for thirty tablets. James also identified a number of prescriptions that Irwin had filled for him.

James also testified that, after he was arrested for possession of drugs, he asked Irwin to prepare a list of all prescriptions that Irwin's pharmacy had filled for him over the past year. Irwin agreed, but told James that he would not show that James had received "too many Preludins together. He'd only show maybe one or two." The list, which

was admitted into evidence, showed only one Preludin prescription, and omitted at least seven others.

Finally, James added that, shortly after Irwin was indicted, Irwin came to James's house to get a statement from James denying that Irwin had ever sold him "extra" Preludin. When James refused, Irwin threatened him.

There was other testimony pointing to Irwin's guilt. For example, Irwin's sales of Preludin dropped from 1400 tablets in a two-month period to 422 during the first two months of the investigation and finally to 180 in a two-month period when it continued. Another pharmacist from the same area testified that his pharmacy sold only about 100 Preludin tablets every four months and that its charge was only $12.50 to fill a prescription for thirty Preludin 75 milligram tablets.

The jury found Irwin guilty on all four of the counts involving delivery to Godfrey ("the Godfrey counts") and two of the "unlawful dispensing" counts involving James ("the James counts"); it returned "not guilty" verdicts as to all the rest. At a post-trial hearing on a motion for a new trial, Hitt revealed for the first time that he had made payments to Godfrey. Irwin then amended his motion to include arguments based on Godfrey's alleged perjury at trial. Irwin's motion was subsequently granted as to the Godfrey counts,[4] but the court reserved decision on the motion as it related to the James counts until further discovery could be had as to whether any other payments had been made to government witnesses. After this discovery was completed, and no other payments were disclosed,

4. The district court subsequently granted the government's motion to dismiss the Godfrey counts.

the trial judge denied Irwin's motion for a new trial on the James counts.

Irwin's appeal is thus from his conviction on the James counts and from the district court's denial of his motion for a new trial on those counts. We examine the latter point first.

II.

Irwin contends that inconsistencies within Hitt's testimony concerning the Godfrey payments at the post-trial hearing, further discrepancies between that testimony and documents relating to those payments produced pursuant to the post-trial discovery order, and, most importantly, Hitt's failure to correct Godfrey's incorrect statement at trial[5] combine to place "a significant taint on all of [Hitt's] sworn testimony, including that adduced at trial." Reduced to its essentials, Irwin's argument is that he should have been granted a new trial on the James counts because he was deprived of the opportunity to impugn Hitt's credibility by interrogating Hitt about his failure to correct Godfrey's misstatement.[6]

5. Although Hitt was present throughout the trial, he apparently made no effort to inform either the prosecutor or the court of Godfrey's misstatement. As noted, however, Hitt was not asked about these payments, and thus did not himself testify incorrectly.

6. Irwin also argues that there were inconsistencies in Hitt's testimony at the post-trial hearing and between that testimony and documentation later produced. Having read the record ourselves, we find no inconsistencies of any significance. For example, the greatest inconsistencies urged by Irwin relate to the purpose for which Godfrey was given $200 at the conclusion of trial. *See* note 3 *supra*. Hitt first stated that this money was paid to Godfrey "for being an informant." He later said that it was paid "to reimburse her for her expenses." Finally, he stated that the $200 was paid to "help her move because she received many threats on her life." Government records indicate only that the $200 was paid "for information." While obviously not identical, none of these responses strikes us as necessarily "inconsistent" with any of the others.

[1–3] Although it is not clear from Irwin's briefs, his argument seems to be founded on the *Brady*[7] doctrine, which requires a new trial when the prosecution has withheld exculpatory information from the defense. In *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court identified three distinct situations involving the nondisclosure of evidence by the prosecution. The first occurs when undisclosed evidence reveals that the government's case contained perjured testimony. *Id.*, 427 U.S. at 103–04, 96 S.Ct. at 2397–98, 49 L.Ed.2d at 349–350. This was the situation claimed to exist with regard to Irwin's request for a new trial on the Godfrey counts because of her alleged perjury at trial.[8] The second type of case, exemplified by *Brady* itself, occurs when the defense makes a specific request for material which is not complied with by the government. *Id.*, 427 U.S. at 104–06, 96 S.Ct. at 2398–99, 49 L.Ed.2d at 350–351. The third nondisclosure situation occurs when either a general request for all exculpatory material has been tendered by the defendant or when there has been no discovery request at all. *Id.*, 427 U.S. at 106–07, 96 S.Ct. at 2399, 49 L.Ed.2d at 351. Moreover, the *Brady* doctrine, as expounded in *Agurs*, applies even though the evidence in question relates solely to the credibility of an important government witness. *United States* v. *Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978).

---

7. *See Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

8. Although Hitt was not technically part of the prosecution team and had not in fact told the prosecutor about the Godfrey payments, the district court, in granting Irwin's motion for a new trial on the Godfrey counts, imputed Hitt's knowledge to the prosecution. *See United States* v. *Antone*, 603 F.2d 566, 569–70 (5th Cir. 1979).

Irwin seeks to bring himself within the second category. The district court, in granting Irwin's motion for a new trial on the Godfrey counts, found that Irwin had, prior to trial, made a specific request that encompassed the payments made to Godfrey, and that this request had not been complied with.

[4–6] While the Court noted in *Agurs* that the prosecutor's failure to respond to a specific request is "seldom, if ever, excusable," *Agurs, supra,* 427 U.S. at 106, 96 S.Ct. at 2399, 49 L.Ed.2d at 351, a new trial does not automatically result. In order to obtain a new trial when a claim falls within the second *Brady-Agurs* category, the defendant must show that the suppressed evidence "might have affected the outcome of the trial." *Id.*, 427 U.S. at 104, 96 S.Ct. at 2398, 49 L.Ed.2d at 350. The small point that might be scored by questioning Hitt about his failure to reveal the untruth in Godfrey's testimony would not be sufficient either to impeach Hitt or to affect the result.

Godfrey's misstatement itself was relatively insignificant, probably unintentional, and perhaps not even heard as such by Hitt.[9] We hasten to add, of course, that we make

9. As noted previously, the question asked of Godfrey was as follows:

The money that you were given [by Hitt] to buy drugs, is that the only money that was given you by any law enforcement agency any time up to the present?

Godfrey responded, "Yes." In fact, at that time, she had been the recipient of approximately $60 to $70. Hitt testified at the post-trial hearing that this money had been given to Godfrey on three separate occasions, in approximately equal $20 amounts, some nine months before trial. Hitt stated that the money was to reimburse Godfrey for her expenses (gas, meals, etc.) in cooperating with the Irwin investigation. It is possible that Godfrey either forgot about these payments or did not consider them to be the type of payments being inquired of by Irwin's counsel; the same may also be said of Hitt.

these observations only as part of our effort to assess the probable significance the jury would have attributed to Hitt's silence in evaluating his overall credibility, which was otherwise virtually unchallenged at trial.[10]

Second, and more important, much of the evidence supporting the jury's findings of guilt on the James counts was not dependent on its assessment of Hitt's credibility. For example, James's testimony was obviously damaging to Irwin. Moreover, one of Irwin's own witnesses, a bookkeeper at Irwin's pharmacy, testified that she "had deducted [sic] from the way [James] came in, how often he came in, the way he acted, that he probably was dealing .... Dealing drugs obviously."

Furthermore, the jury could reasonably have inferred from the prescriptions entered into evidence that Irwin knew that the Preludin prescriptions he was filling for James were not for a legitimate purpose. Irwin filled six different Preludin prescriptions for James (from four different doctors) over a three-month period for a total of more than double the amount of Preludin which could have been legitimately prescribed over that period.[11] There is no

10. Irwin attempted to challenge Hitt's credibility at only one point during trial, namely, when Hitt described Irwin's behavior during Hitt's initial investigatory visits to Irwin's pharmacy as "nervous" and only minimally cooperative.

11. The six prescriptions were for a total of 214 75 milligram Preludin tablets, which were to be taken once a day, during this three-month, or approximately 100-day, period.

In addition, the information on Preludin contained in the Physician's Desk Reference, a standard treatise in the field, was read to the jury. This information indicated that "tolerance [to Preludin] usually develops within *a few weeks*. When this occurs, the recommended dose should not be exceeded in an attempt to increase anoretic [appetite-suppressant] effect. Rather, the drug should be discontinued."

question that Irwin knew who James was, both by name and face, since they had known each other for approximately twenty-five years, both having grown up in Tatum, Texas.

Based on this array of evidence, none of which depends upon Hitt's credibility, we cannot conclude that Irwin's inability to question Hitt about his failure to correct Godfrey's misstatement, thus possibly somewhat impeaching his credibility, "might have affected the outcome of the trial" on the James counts. We, therefore, hold that the district court did not err in denying Irwin's motion for a new trial on those counts. We turn to Irwin's direct challenges to his conviction.

III

It is unlawful to dispense a controlled substance except as authorized by law. 21 U.S.C. §841(a)(1). Pharmacists are authorized to dispense controlled substances pursuant to prescription, *see* 21 U.S.C. §829, but 21 C.F.R §1306.04(a) limits that authorization. The prescription must be issued for a legitimate medical purpose by an individual physician acting in the usual course of his professional practice. While the responsibility for the proper prescribing and dispensing of controlled substances is upon the physician, the regulation imposes a "corresponding responsibility" upon the pharmacist who fills the prescription. Thus, the regulation provides that, if an order purporting to be a prescription is not a prescription despite its appearance and, if the pharmacist knows that it was not issued in the usual course of professional treatment, both the person issuing the ostensible prescription and the person who knowingly fills it shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances. 21 C.F.R. §1306.04(a).

In instructing the jury, the trial judge set forth these requirements, and then also detailed the requirements of other state and federal laws regarding the proper form and contents of prescriptions. The trial court apparently thought evidence showing that Irwin filled prescriptions not in proper form was relevant to the main issue in the case, whether Irwin knowingly filled prescriptions for Preludin that he knew were not for a "legitimate medical purpose," 21 C.F.R. §1306.04(a).

[7] Irwin argues that the inclusion of these instructions regarding the state and federal requirements impermissibly broadened, amended or altered the indictment in contravention of the fifth amendment. *See Stirone* v. *United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). The crux of these arguments is that these "extraneous" instructions might have led the jury to convict him of the offenses charged in the indictment based upon violations of regulations not therein specified. *See, e.g., United States* v. *Salinas*, 654 F.2d 319, 322–25 (5th Cir. 1981) ("Salinas II"); *United States* v. *Ylda*, 653 F.2d 912, 913–15 (5th Cir. 1981) (on petition for rehearing and petition for rehearing en banc); *United States* v. *Bizzard*, 615 F.2d 1080, 1081–82 (5th Cir. 1980); *United States* v. *Salinas*, 601 F.2d 1279, 1288–91 (5th Cir. 1979) ("Salinas I"); *United States* v. *Carroll*, 582 F.2d 942, 943–45 (5th Cir. 1978).[12]

12. Irwin objected to the instructions on the state requirements, but failed to do so with regard to those relating to the federal requirements. Therefore, we could reverse Irwin's conviction based on the inclusion of the latter only if this constituted "plain error." *See United States* v. *Abravaya*, 616 F.2d 250, 251 (5th Cir. 1980); Fed.R.Crim.P. 52(b). In view of the conclusion we have reached that there was no error, the question is moot.

[8] The trial court's instructions are not to be dissected word by word and line by line but are to be construed as a whole. *See Cupp* v. *Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 373 (1973); *United States* v. *Brooks*, 611 F.2d 614, 619 (5th Cir. 1980). If, thus read, they might have led the jury to convict Irwin on grounds not charged in the indictment, his conviction must be reversed.

The jury charge expressly instructed that the government must prove beyond reasonable doubt three essential elements in order to establish each of the offenses charged in the indictment. It must show that the defendant distributed a controlled substance, as charged; he did so other than for a legitimate medical purpose and in the usual course of his profession; and he acted knowingly and intentionally. The court further instructed the jury that a physician who prescribes in the usual course of professional practice for a legitimate medical purpose does not, of course, commit a violation of law, nor does a pharmacist who fills such a prescription.

As the district court noted, "nothing in this key portion of the charge indicated that a technical flaw on the face of a prescription would warrant conviction." Moreover, the remainder of the charge emphasizes the crucial importance of the legitimacy of the purpose for which the controlled substance was prescribed and dispensed.

Finally, the jury was instructed: "The Defendant is not on trial for any act or conduct not alleged in the indictment." We subscribe to the district court's conclusion:

> [I]t was made clear as possible that a conviction could follow only upon a determination that the government had proven each of the elements of the offense charged

> beyond a reasonable doubt. The jury was directly pre[illegible]rom finding the defendant guilty on the [illegible]f any other violation of law, not charged in the indictment, which might have occurred. Taken as a whole, the charge did not authorize a conviction based upon a violation of the [state and federal requirements].

[9] In the cases we have cited in which the conviction was reversed, the jury "might have" convicted the defendants on charges not included in the indictment only in the sense that the jury's instructions specifically authorized them to do so. Thus, in *United States* v. *Carroll, supra,* for example, the defendant was indicted for conspiracy to commit specific offenses X and Y, whereas the jury instructions specifically stated that the defendant could be convicted if he had conspired to commit offenses X, Y *or Z*. 582 F.2d at 943–44. Here, by contract, the jury "might have" convicted Irwin for offenses not charged in the indictment only if it misunderstood the charge. Because the instructions at issue neither authorized the jury to convict Irwin for offenses not specified in the indictment, nor were so confusing as to mislead them into doing so, we consider the charge proper.

IV.

Finally, Irwin argues that numerous prosecutorial improprieties necessitate reversal of his conviction. One of the alleged improprieties occurred during the questioning of a defense witness:

> Q. You were subpoenaed to the federal grand jury back, oh, on May 30, 1980, were you not?
>
> A. I was, but I couldn't tell you what day.

Q. You don't remember the exact date. You remember that subpoena, though, at the end of May?

A. Yes.

Q. You and some — how many people were up there, about eighty witnesses — testifying before the grand jury.

A. There were a lot of people.

Q. And you're familiar with the fact that this defendant and a number of other doctors and pharmacists were indicted, were they not?

Defense counsel immediately objected, and the objection was sustained. The court instructed the jury not to consider this statement or any answer that the witness may have made. The parties thereafter stipulated to the jury that "the facts are that only one person, to wit, John Hitt, testified before the grand jury that returned the indictment in this case."

[10,11] An instruction to disregard is sufficient, unless the remark is so highly prejudicial that it is incurable by the court's admonition. *United States* v. *Carillo,* 565 F.2d 1323, 1326 (5th Cir.), *cert. denied,* 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1979). The facts implied by the prosecutor's question were not so prejudicial that the trial court's admonition was insufficient. The stipulation made the truth evident.

[12] Irwin also argues that the entire trial was "riddled" with references to "preludin doctors" and "preludin pharmacists." He points to a total of fourteen such references

during his five-day trial. These references were made without objection. Spread as they were over a five-day period, their admission does not constitute such plain error as to warrant reversal. Fed.R.Crim.P. 52(b).

[13] Finally, Irwin complains that Hitt was allowed to testify "at some length" about his investigative activity relating to the prescription writing and filling practices of doctors and pharmacists throughout the East Texas area, thereby creating an impression that Irwin was "only part of a widespread and possibly related scheme or problem." The record reveals, however, that most of this testimony occurred during Hitt's cross-examination, over the *government's* objection on grounds of irrelevancy. The defendant explained at trial that he was attempting to establish the basis for a claim of "selective prosecution." Under these circumstances, even if we found Hitt's testimony prejudicial, which we do not, we would not reverse Irwin's conviction because the testimony was elicited by Irwin's counsel.

For these reasons, both the order denying Irwin's motion for a new trial on the James counts and Irwin's conviction on those counts are AFFIRMED.

Appendix B

B-1

U.S. Court of Appeals
FILED
December 30, 1981
Gilbert F. Ganuchaeu
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2088

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES WARREN IRWIN, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas.

ON PETITION FOR REHEARING

(December 30, 1981)

Before GEE and RUBIN, Circuit Judges, and SPEARS*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

Clerk's Note:
See Rule 41-FRAP and local Rule 17 for stay of the mandate

*District Judge from the Western District of Texas, sitting by designation.

Appendix C

C-1

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
December 5, 1980
MURRAY L. HARRIS,
CLERK
BY DEPUTY: Jay Vandever

IN THE UNITED STATES COURT OF APPEALS
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITED STATES OF AMERICA	)	
V.	)	**NO. TY-80-25-CR**
JAMES WARREN IRWIN, JR.	)	

ORDER

I. FACTUAL BACKGROUND

Following a jury trial, defendant in the above-captioned criminal action was convicted of six counts of violating 21 U.S.C. §841(a)(1) and 21 C.F.R. §13.06.04(a) by dispensing a controlled substance pursuant to prescriptions which he knew were not issued in the usual course of medical practice for legitimate medical purposes. On September 17, 1980, defendant moved for a new trial in accordance with Rule 33, F.R.CRIM.P. In his motion, defendant alleged multiple errors in the court's instructions to the jury. Defendant further asserted as grounds for a new trial certain objectionable remarks made by the prosecutor in the presence of the jury concerning proceedings before the

grand jury in cases not involving the accused. Finally, defendant claimed that the evidence presented by the prosecution was insufficient to support the guilty verdict rendered by the jury on Counts IV through IX of the indictment.

On September 26, 1980, defendant filed an amended motion for new trial which reiterated the contentions set forth in his original motion and asserted an additional ground for relief based upon newly-discovered evidence. Defendant claimed that the government's failure to provide his attorneys with information concerning the search and arrest of Janice Godfrey, a key prosecution witness, on July 25, 1980, was prejudicial to the extent of requiring a new trial.

The court conducted an oral hearing on defendant's amended motion for new trial on October 9, 1980. During the course of the hearing, sworn testimony was received from several witnesses, including John Hitt, a narcotics investigator for the Texas Department of Public Safety (D.P.S.), who assisted the U. S. Attorney's office in conducting the investigation and preparing this case for trial. Agent Hitt revealed that he had given Janice Godfrey approximately two hundred and seventy dollars while she was working as in informant for the D.P.S. Transcript at 10. On direct examination by defendant's counsel, Agent Hitt testified that approximately sixty dollars of that total was provided for expenses, while the remainder was paid to Ms. Godfry for her services as an informant. Transcript at 11. Subsequently, on redirect examination, Agent Hitt stated for the first time that some sixty dollars had been given to Ms. Godfrey prior to trial, while the remainder was turned over after the trial concluded to assist her in moving

to another residence because she had received numerous threats on her life. Transcript at 18-20. Apparently, none of these payments were ever disclosed to the United States Attorney or any member of his staff prior to Agent Hitt's testimony at this oral hearing. Whatever the actual purpose of these payments and whenever they actually were made, it is undisputed that neither the defendant nor the jury was informed about them before the conclusion of trial.

After the completion of testimony at the oral hearing, defendant's counsel, with leave of the court, made a further motion for new trial based upon the newly discovered evidence of payments by Agent Hitt to the government's witness, Janice Godfrey. Both parties submitted written briefs on this supplemental new trial motion. On October 20, 1980, defendant's counsel filed a motion for continuing discovery and inspection, seeking the details and written documentation of any payments made by the U.S. Attorney or cooperating law enforcement agencies to Janice Godfrey, Tom James, or any other person in connection with the investigation of the defendant. That motion, in addition to defendant's various motions for new trial, is now before the court for disposition.

II. THE NONDISCLOSURE OF PAYMENTS TO GOVERNMENT WITNESS.

A. *General Principles of Law Concerning Nondisclosure of Evidence.*

The legal standards to be applied in a case where the government fails to disclose relevant information to a criminal defendant before or during trial are set forth in *Brady* v *Maryland, 373 U.S. 83 (1963), and its progeny,*

particularly United States v. *Aqurs,* 427 U.S. 97 (1976). Two distinct variables must be analyzed in such a case. First, as with the harmless error rule applied to all violations of due process, the court must determine the probable impact of the nondisclosure upon the judgment of the jury. *See Chapman* v *California,* 386 U.S. 18, 23-26 (1967). The greater the probative value of the evidence suppressed, the more likely a new trial will be required to remedy the violation. Second, the relative degree of responsibility borne by the prosecutor for the omission of material evidence determines the standard to be applied by the court in deciding whether a new trial is necessary. While the subjective good faith or maliciousness of the prosecutor in withholding information is not dispositive, it remains significant in dictating the degree of scrutiny to be applied.

In *Aqurs,* The Court identifies three distinct situations involving the nondisclosure of evidence by the prosecution to criminal defendants, each requiring a different form of analysis. The first situation, exemplified by *Napue* v. *Illinois, 360 U.S. 264 (1959), and Giglio* v. *United States,* 405 U.S. 150 (1972), occurs where undisclosed evidence reveals that the government's case contained perjured testimony about which the prosecutor knew or should have known. A strict standard of materiality applies in such cases, because they involve a corruption of the truth-seeking function of the trial process. *Aqurs,* 427 U.S. at 103.[1] Since a conviction based on the knowing use of perjured testimony is fundamentally unfair, a new trial must be granted "if there is any reasonable likelihood that

1. The term "strict standard of materiality" in this context refers to the degree of scrutiny the court is obliged to accord nondisclosed evidence. The stricter the standard, the greater the likelihood that the evidence will be found material and a new trial required.

the false testimony could have affected the judgment of the jury." *Id.*

The second type of case involving nondisclosure by the prosecution is illustrated by *Brady* v. *Maryland*, 373 U.S. 83 (1963). In *Brady*, the defendant made a specific discovery request for relevant materials which was not complied with fully by the government. The standard of materiality in such instances remains quite strict, for the prosecutor's failure to respond to a specific request for pretrial discovery is "seldom, if ever, excusable." *Aqurs*, 427 U.S. at 106. In order to obtain a new trial, the defendant must show that the suppressed evidence might have affected the outcome of the trial. *Id.* at 104. Evidence which could be used only to impeach a witness's credibility, as well as evidence bearing directly on guilt, or innocence, may satisfy this test of materiality if the reliability of that particular witness is important. *Giglio*, 405 U.S. at 154; *Napue*, 360 U.S. at 269.

The third nondisclosure situation described in *Aqurs* is where either a general request for all exculpatory material has been tendered by the defendant or there has been no discovery request at all. Under these circumstances, the burden of materiality placed on the defendant is considerably greater than in the first two situations. In order to be entitled to a new trial, the defendant must shown that the omitted evidence creates a reasonable doubt of guilt which did not otherwise exist. *Aqurs*, 427 U.S. at 112-113. The prosecution has no obligation, in the absence of a specific request, to reveal all that it knows about a particular witness to the defendant. *Id. at 109; see also United States* v. *Brown*, 1980 adv. sh. 450, 453 (5th Cir. Oct. 20, 1980).

There is actually a fourth category of newly-discovered evidence, not involving suppression by the prosecutor,

which may produce a Rule 33 motion for new trial. Should the defendant discover evidence following his trial, which was not in the possession of the government, a new trial will be ordered only if the court finds that an acquittal would probably have resulted had that newly-discovered evidence been available to the defendant at trial. *Aqurs*, 427 U.S. at 111. Strictly speaking, such a situation does not involve prosecutorial nondisclosure, since the evidence at issue is acquired from a source other than the government. The burden imposed upon a defendant is such circumstances is particularly heavy, because he must convince the court that the newly-discovered evidence would have made the difference, in the jury's eyes, between quilt and innocence.

Thus, while the moral culpability or subjective good faith of the prosecutor is not directly taken into account in ruling upon a motion for new trial based upon newly-discovered evidence, the prosecutor's degree of responsibility, if any, is important since it determines the standard of materiality which must be applied.[2] The Supreme Court has established, in effect, a continuum of four standards based upon the prosecutor's role. At one end of this spectrum lies the case involving perjured trial testimony by government witnesses, introduced with the actual or constructive knowledge of the prosecutor. In such a case, where the prosecutor's culpability is greatest, the burden of materiali-

2. Another way of explaining this concept is that the probative value of the suppressed evidence necessary to warrant a new trial varies in inverse proportion to the prosecutor's degree of fault. The more egregious the prosecutor's conduct, the less probative value the evidence must contain. Of course, if the availability of the evidence at trial would, beyond a reasonable doubt, have had no effect upon the judgment of the jury, it must be deemed immaterial under any standard and the jury's verdict must be upheld.

ty placed upon the defendant is relatively light. That burden increases in a case where the prosecutor has failed to respond fully to a specific request for pretrial discovery. It grows still further where the prosecutor failed to disclose evidence in the absence of any specific request by defendant. Finally, at the opposite end of the spectrum, lies newly-discovered evidence obtained from a neutral source which was unknown to the prosecutor prior to or during the trial. In such a case, the burden on the defendant to demonstrate the decisive character of this evidence is extremely heavy.

B. *Application of Legal Standards to Evidence of Payments to Janice Godfrey.*

Defendant contends that the nondisclosure of payments made to Janice Godfrey by a member of the prosecution team must be examined under the first two standards of materiality described above. First, defendant asserts that the government's failure to provide this information prior to trial constituted noncompliance with a specific discovery request tendered by the defendant and approved by the court. Second, defendant claims that evidence of these payments demonstrates that false testimony was given by Ms. Godfrey, a key prosecution witness, at trial. On both of these ground, defendant contends that the nondisclosure was sufficiently material and prejudicial to violate constitutional due process and require a new trial.

1. *The Discovery Request.*

On June 24, 1980, some ten weeks prior to the start of trial, defendant filed a motion for discovery and inspection pursuant to F.R.CRIM.P. 16. In his motion, defendant

specified forty separate categories of desired information, including:

> 33. The details of any arrangement made with or promise made to any prospective Government witness which might affect the credibility of such witness.

On July 11, 1980, the court issued an order granting, in whole or in part, thirty-four of defendant's discovery requests. Request numbered 33, quoted above, was granted without qualification as it sought information which might prove favorable to the defense. The government did not disclose that payments had been made to Janice Godfrey in response to this or any other discovery request.

At the outset, it is important to note that the existence of these payments should have been made known to the defendant even in the absence of any discovery request whatever. The government's affirmative obligation to tender information favorable to the defendant prior to trial is set forth in *United States* v. *Agurs,* 427 U.S. 97, 109 (1976) and *Brady* v. *Maryland,* 373 U.S. 83 (1963). That duty of disclosure is not diminished by the fact that the evidence in question may relate solely to the credibility of an important government witness. *Napue* v. *Illinois,* 360 U.S. 264, 269 (1959); *United States* v. *Anderson,* 574 F.2d 1347, 1355 (5th Cir. 1978). While the prosecutor is not required to speculate on the possible impeachment value of every shred of information in his files concerning a witness, he is obliged to employ reasonable judgment in deciding whether particular evidence is sufficiently important to be turned over to the defendant. Cash payments by a member of the prosecution team to a prospective witness, for any purpose, clearly fall on the side of the line where disclosure is mandated. See *United States* v. *Librach,* 520 F.2d 550, 553 (8th Cir.

1975) (reversal required where financial support of witness in protective custody by government was not disclosed to the defendant.)

Nevertheless, it is important to determine whether or not a specific request for this information was made by defendant, in order to fix the appropriate standard of review to be applied by the court. If such a specific request encompassing the newly-discovery evidence of payments to the witness was made, the defendant must show only that the suppressed evidence might have affected the outcome of the trial. *Agurs,* 427 U.S. at 104. But if there was only a general request for information, or no relevant request at all, a new trial will be ordered only if the omitted evidence creates a reasonable doubt of guilt which did not otherwise exist. *Id.* at 112–13. In *Agurs,* the Court attempts to delineate the obscure line between a specific and general request for information. *Id.* 106–07. One key difference is that a request of the former variety gives the prosecutor notice of exactly what the defendant seeks, while the latter does not. *Id.* at 106.

The defendant's discovery request at issue here can be viewed as specific in nature only if it is construed strictly in accordance with its express terms. It is noteworthy, as the government points out in its brief, that the defendant did not ask for information concerning any payments which had been made to prospective witnesses, including the circumstances under which such payments were made. Rather, the request was limited, by its own terms, to the details of any "arrangement" or "promise" between the government and its witnesses.

Both of these terms embody the notice of an agreement or *quid pro quo*. Yet the testimony elicited from Agent Hitt at the oral hearing on October 9th did not include any evidence of such an agreement between the government and Ms. Godfrey. Agent Hitt did not indicate that he ever promised or arranged with Ms. Godfrey to pay her expenses or any other money prior to actually making those payments. Indeed, defendant's counsel never inquired of Agent Hitt whether any promise or arrangement had been entered into at any time prior to trial. Viewed in this narrow sense, the defendant's request for discovery did not necessarily require the government to divulge that it had made payments of some kind to Ms. Godfrey, and the government's failure to volunteer that information cannot be examined under the strict standard of materiality applicable to instances of noncompliance with specific discovery request.

Alternatively, defendant's request for details of any "arrangement" or "promise" might be construed more broadly to encompass any transaction, communication, or interaction between the government and its prospective witnesses which might be helpful to the defendant in seeking to impeach those witnesses at trial. Under such an expansive interpretation, payments by the government to Janice Godfrey, for reimbursement of expenses or any other purpose, would certainly be included within the scope of information sought. But were the defendant's request that general in nature, it would fail to meet the basic requirement of a specific request — "notice of exactly what the defendant desired." *Agurs*, 427 U.S. 106. The prosecutor's nondisclosure would accordingly be examined under the third category described above, with the defendant bearing

the burden of showing that the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. *Id.* at 112–13.[3]

Thus, whether the defendant's request for details of promises or arrangements is construed as specific or general, a strict standard of materiality does not apply to the nondisclosed evidence concerning payments made by Agent Hitt to Ms. Godfrey. Defendant must accordingly satisfy a weightier burden to justify a new trial. Due to the disposition, below, of defendant's related contention concerning false testimony by a government witness, there is no need for the court to decide whether or not that heavy burden has been met.

2. *The False Testimony Claim.*

During the course of the trial, the government called Janice Godfrey as one of its witnesses. Ms. Godfrey testified

3. This dual form of analysis was employed by the Court of Appeals for the First Circuit in analyzing a comparable discovery request in *United States* v. *DeCarlo*, 575 F.2d 952 (1978), *cert. denied* 439 U.S. 834 (1979). In 06DiCarlo, the defendants filed a pretrail request seeking, *inter alis*,

> *All statements or promises or rewards of any kind, or tending in any way, directly or indirectly, to induce or encourage the giving of testimony, which statements have been made to any persons whom the Government intends to call as witnesses at the trial of the indictment herein.*

The defendants there claimed that letters written by an Assistant U.S. Attorney to prospective business customers of government witnesses commending those witnesses should have been disclosed pursuant to that request. The Court, treating the defendants' request as specific in nature, found that the letters in question did not strictly fall within its terms. "Alternatively," the court observed, "if the request sought more, it failed to meet the basic requirements of a specific request . . ." *Id.* at 960, fn. 7.

on direct examination that she frequently had prescriptions filled for Preludin, a controlled substance, at defendant's pharmacy and then sold the drugs illegally on the street. She further testified that she had worked with Agent Hitt, who provided her with phony Preludin prescriptions on several occasions, which she took to the defendant to be filled. She also testified that Agent Hitt gave her the cash necessary to purchase the drugs from defendant prior to each of these arranged visits.

On cross-examination, defendant's counsel sought to impeach Ms. Godfrey's credibility in order to discredit her testimony in its entirety. During the course of cross-examination, the following exchange occurred:

Q. The money that you were given to buy the drugs, is that the only money that was given you by any law enforcement agency any time up to the present?

A. Yes.

It must be kept in mind that at the time he asked this question, defendant's counsel had no knowledge of any additional payments to Ms. Godfrey by Agent Hitt. Having been assured by the witness that she had received no other money from government law enforcement authorities, counsel moved on to other topics of cross-examination.

Ms. Godfrey's response to the specific question posed by defendant's counsel at trial directly contradicts sworn testimony delivered by Agent Hitt at the evidentiary hearing held on October 9th that he had paid her approximately 270 dollars at one time or another in addition to the money used to purchase the drugs from defendant. While Agent Hitt's

testimony was somewhat inconsistent as to precisely when various sums of money were paid to the witness, a minimum of sixty dollars apparently changed hands prior to trial. The court finds completely credible the admission by Agent Hitt that he gave cash to Ms. Godfrey on one or more occasions and must accordingly conclude that Ms. Godfrey's testimony at trial that no such payments were made was untrue.

The significance of that false testimony is not diminished in any way by the fact that the Assistant U. S. Attorney who prosecuted the case at trial had no actual knowledge of payments to Janice Godfrey by Agent Hitt. The prosecution is an entity, not merely a collection of individual investigators and attorneys. The knowledge of one member of the prosecution must be attributed to all. *Giglio*, 405 U.S. at 154; *United States v. Butler*, 567 F.2d 885, 889 (9th Cir. 1978).

The individual with knowledge in this case, Agent Hitt, was a state narcotics investigator, not a staff member of the U. S. Attorney's office. These circumstances are similar to those present in *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979). In that case, state police secretly arranged to pay the fees of a private attorney for a witness in a federal criminal prosecution. Neither the U. S. Attorney nor any member of his staff knew of this arrangement. At trial, the witness falsely testified that he had retained counsel with his own funds.

In analyzing this set of circumstances, the Court of Appeals pointed out that there was no meaningful way to distinguish among different governmental agencies in-

volved in a prosecution. The court focused on the "prosecution team", including both investigative and prosecutorial personnel. *Id.* at 569. *See also Barbee v. Warden, Maryland Penitentiary*, 331 F.2d at 842, 846 (4th Cir. 1964). As for the distinction between state and federal personnel, the *Antone* court observed that state officers were an important part of the government's case as investigators and witnesses. "The state agents," it concluded, "were in a real sense members of the prosecutorial team," *Id.* at 570. Thus, the knowledge of the state police who entered into a secret agreement with the government's witness was imputed to the prosecution as a whole.

With respect to this issue, the *Antone* decision is controlling in the case at bar. Agent Hitt, who made payments to Ms. Godfrey, knew that she was testifying falsely concerning such payments at trial. That actual knowledge by a member of the prosecution team must be imputed, by implication, to the office of the United States Attorney which prosecuted the defendant.[4]

The fact that Ms. Godfrey's false testimony was delivered on cross-examination, in response to a question posed by defendant's attorney, rather than on direct examination by the prosecutor, does not diminish its significance on defendant's motion for new trial. Even where the govern-

4. Even if actual knowledge of Ms. Godfrey's false testimony was not imputed to the government, a strict standard of materiality with respect to this nondisclosure would be applied by the court. Negligent suppression of evidence is no less harmful to defendant's case than deliberate nondisclosure. *Barbee*, 331 F.2d at 846. The prosecutor has ready access to a veritable storehouse of information. *United States* v. *Auten, No. 80-1269, slip. op. at 1715 (5th Cir. Dec. 8, 1980). It would be unfair to penalize a defendant for the prosecution's failure to seek out information readily available to it. Id.*

ment does not affirmatively solicit false evidence, it must not permit it to go uncorrected. *Giglio*, 405 U. S. at 153; *Napue*, 360 U. S. at 296. The prosecution bears a duty to correct the false testimony of a government witness whenever that evidence appears. *United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977). That duty was completely disregarded in this case.

Thus, the circumstances presented by Ms. Godfrey's false testimony fall directly within the first category of nondisclosure cases described by the Supreme Court in *Agurs*, necessitating the application of the strictest standard of materiality. Under that standard, a new trial is required if the false testimony "could in any reasonable likelihood have affected the judgment of the jury." *Agurs*, 427 U. S. at 103; *Giglio*, 405 U. S. at 154. The Court of Appeals for the Fifth Circuit has repeatedly emphasized that the defendant's burden to justify a new trial under this test is relatively light. In *United States v. Anderson*, 574 F.2d 1347, 1355 (1978), the court declared:

> Of the four standards for measuring the materiality of the undisclosed evidence, this 'reasonable likelihood' standard is the lowest threshold for reversal. That is, the defendant's burden of showing the materiality of the suppressed evidence, a showing which requires reversal, is the least onerous of the four type situations.[5]

5. The required showing is still less onerous when presented to the trial judge in the first instance rather than the Court of Appeals. The disposition of a defendant's motion for new trial is within the sound discretion of the court. The denial of such a motion will be reversed on appeal only where it is shown that the ruling was so clearly erroneous as to constitute an abuse of discretion. *United States* v. *Antone*, 603 F.2d 566, 568 (5th Cir. 1979). This court, in considering defendant's motion, is writing on a clean slate.

In *United States v. Barham*, 595 F.2d 231, 242 (1979), the Court of Appeals added that the "reasonable likelihood" standard of materiality

> is a brother, if not a twin, of the standard ("harmless beyond a reasonable doubt") for determining whether constitutional error can be held harmless.

It should be noted that the standard of materiality applicable to cases such as this, as set forth by the Supreme Court in *Napue* and its progeny, focuses on the likelihood of affecting the judgement of the jury, rather than necessarily changing the jury's verdict as such. The Court of Appeals for the Ninth Circuit has interpreted the standard as requiring a new trial

> whenever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict.

United States v. Butler, 567 F.2d 885, 890 (1978). According to that Court of Appeals, the applicable test concentrates on the weight accorded other evidence, rather than on the outcome of the case. *Id.* That formulation may be viewed as another way of articulating the point made by the Court of Appeals for the Fifth Circuit in *Anderson* and *Barham* that this standard requires a new trial, unless the court is reasonable certain that the nondisclosure of false testimony by a government witness had no substantial effect upon the jury. *See also United States v. Auten*, No. 80-1269 (5th Cir. Dec. 8, 1980).

The application of this test is not an easy task. The court must, hypothetically, put itself into the position of the jury and decide whether that jury's judgment might reasonable

have been influenced if the government had satisfied its burden of revealing the falsity of Ms. Godfrey's testimony. This assessment is made all the more difficult because the court was not privy to the jury's deliberations and thus does not know the extent to which the jury's judgment was affected by the testimony of Ms. Godfrey or that of any other witness. In that respect, the court, as suggested in *Barham*, is in a position akin to that faced by the Court of Appeals in deciding whether a particular trial error was harmless beyond a reasonable doubt.

At first glance, the sixty dollars or two hundred and seventy dollars received by Ms. Godfrey from Agent Hitt prior to trial does not appear to be a sufficiently large sum to lead the jury to alter their judgment concerning the credibility of Ms. Godfrey as a witness, had they been told of those payments. As the government points out, the jury already knew that Ms. Godfrey had been granted immunity for her cooperation with the government, and that she was a confessed drug dealer and trader in stolen merchandise. Yet the existence of any financial support of Ms. Godfrey by the government, as additional evidence of possible bias, might have led one or more of the jurors to harbor increased doubts concerning the credibility of her testimony as a whole. Even more significantly, the jury's knowledge that Ms. Godfrey had testified falsely concerning these payments might well have affected their judgment about whether or not she was telling the truth with respect to other matters, including those touching directly upon the guilt or innocence of the defendant. This was the approach adopted by the Court of Appeals for the Fifth Circuit in *Barham* in reversing a defendant's conviction because government witnesses had left a false impression with the jury that they had received no promises of leniency from the government in return for their testimony. The court

found that while the jury certainly had a right to know the details of any such promises,

> (y)et another more persuasive reason to doubt their testimony — the very fact that they had attempted to give the jury a false impression...,

compelled a new trial. 595 F.2d at 243.

It is, of course, immaterial that the nondisclosed evidence in this case involved the credibility of a government witness, rather than the conduct of the accused. As the Supreme Court observed in *Napue*,

> (t)he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence...

360 U. S. at 269. *See also United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978). Four of the six counts of the indictment on which a guilty verdict was returned involved the alleged filling of prescriptions for Preludin by the defendant for Ms. Godfrey. As to those particular counts, Ms. Godfrey was the key witness in the government's case. Had one or more members of the jury disbelieved her testimony or even doubted it, their judgment concerning those four counts could well have been affected. Knowledge that her testimony concerning payments made to her by law enforcement personnel was false might have engendered such doubts.[6]

6. The two remaining counts on which the jury returned a quality verdict involved the alleged filling of Preludin prescriptions by defendant for a different individual, Tom James. Mr. James testified as a prosecution witness concerning those alleged transactions. Janice Godfrey's testimony did not pertain in any respect to the counts of indictment involving the filling of prescriptions for Tom James. There is thus no reason to believe that the judgment of the jury concerning those two counts have been affected by their knowledge of the falsity of Ms. Godfrey's testimony.

The government argues emphatically that defendant already had much ammunition with which to impeach Ms. Godfrey, and that he used that ammunition in attacking her credibility during extensive cross-examination. The government relies upon the decision in *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979), to justify its conclusion that the nondiscloded evidence here was merely cumulative and does not warrant a new trial.

As noted above, evidence that this witness had given false testimony under oath is of a qualitatively different character than the other weapons of impeachment utilized by defendant's counsel. The special treatment accorded evidence bearing on reputation for truthfulness and conviction of crimes involving dishonesty or false statements by the Federal Rules of Evidence refects the unique importance attributed to such evidence under our judicial system. F.R.F. 608, 609. The fact that defendant's counsel did engage in an attempt to impeach Ms. Godfrey does not render evidence of her false testimony, which could also have been used to impeach her, merely cumulative in nature.

The *Antone* case (cited by the government) merits discussion, as it bears upon the court's application of the "reasonable likelihood" standard to Ms. Godfrey's false testimony. As noted above, *Antone* involved false testimony by a government witness that he had hired his own attorney when that attorney's fees were in fact being paid by the state under a secret agreement with the witness. The trial court denied defendant's motion for new trial based upon this newly-discovered evidence and defendant appealed. In affirming the trial court's ruling, the Court of Appeals observed that its limited role was to determine whether the

trial court's application of the "reasonable likelihood" standard was clearly erroneous. The witness admitted during cross-examination that he had lied under oath in the past. He admitted prior inconsistent statements about matters relevant to his testimony. He conceded that he was biased against one of the defendants. The superintendent of the prison in which the witness was confined testified that he had a poor reputation for veracity. Given all of this adverse testimony regarding the witness's credibility, the trial court apparently concluded that additional evidence of the witness's false testimony could not reasonably have affected the judgment of the jury, the Court of Appeals did not find that conclusion to be clearly erroneous.

The factual situation presented in *Antone* is dramatically different from the case at bar. While Ms. Godfrey was impeached on cross-examination, there was no evidence that she had ever lied under oath, made inconsistent statements, harbored a grudge against the defendant, suffered from mental illness, or maintained a poor reputation for truthfulness. Under these circumstances, evidence demonstrating that she had testified falsely concerning payments received from Agent Hitt could well have had an effect on the jury's judgment. Moreover, this motion was presented to this court in the first instance. No prior determination of harmlessness of the evidence was made here, as was in the case in *Antone* In order to find that the defendant is entitled to a new trial, this court need not overturn the conclusion reached by a prior fact-finder. Thus, the opinion of the Court of Appeals in *Antone*, based upon the particular facts and circumstances present in that case, does not control the disposition of defendant's motion here.

The court concludes that there is a reasonable likelihood that the government's failure to correct the false testimony delivered by its witness could have affected the judgment of the jury with respect to Counts IV, V, VI and VII of the indictment. Accordingly, a new trial must be granted on these four counts.

III. DEFENDANT'S MOTION FOR FURTHER DISCOVERY.

Testimony at the oral hearing on defendant's new trial motion revealed that at least one key prosecution witness had received cash payments from the investigating agent prior to trial. No direct inquiry was made by the prosecution to any of its other witnesses, including Tom James. If such payments were indeed made without the knowledge of the defendant, he has a right to bring that fact to the attention of the court as a claimed violation of due process. Faced with such evidence, the court would have to consider all of the surrounding circumstances to assess the likely impact of the nondisclosure upon the jury with respect to Counts VIII and IX of the indictment.

That determination cannot be made until all of the facts concerning payments by the prosecution to witnesses in this case are finally disclosed. Accordingly, the government shall be required to provide the defendant with all information which it has or can acquire with due diligence, including written records, receipts, and documentation, pertaining to payments or other benefits provided to Tom James, Janice Godfrey, or any other person who testified as a witness at defendant's trial. While only those payments or benefits provided in connection with this particular prosecution need be disclosed, the defendant is entitled to know

about any promises or agreements made prior to or during this trial, even if the actual payment or awarding of benefits occurred thereafter. Internal government reports or memoranda related to this prosecution need not be disclosed, such documents being protected from discovery by F.R.CRIM.P. 16(a)(2).

The consideration of the remaining grounds set forth in defendant's first amended motion for new trial, as they apply to Counts VIII and IX, shall be postponed pending the completion of the discovery ordered herein. The government shall fully comply with its obligations under the order within fourteen days. Upon receipt of the government's response, defendant shall have ten days in which to file any additional motions for new trial, should he wish to do so. After that process is completed, the court will consider all pending motions for new trial with respect to Counts VIII and IX.

It is with considerable reluctance that the court takes these actions. The expeditious resolution of criminal accusations is an important element of justice. But trials can only proceed promptly and fairly if all those involved carry out their responsibilities. The jury in this case spent a week hearing the evidence and did its duty in rendering a verdict. But because the members of the prosecution team failed to communicate with one another and share pertinent information with the defendant, much of that jury's work has been effectively wasted. Discovery ought to be completed prior to trial, not continued long after a verdict has been rendered. But the government neglected its obligation to turn over all favorable evidence to the defendant before trial, and the court has a duty to determine whether additional information remains hidden in government files before ruling on the merits of defendant's other claims.

On the basis of the foregoing, it is accordingly ORDERED:

(1) Defendant's motion for new trial on Counts IV, V, VI, and VII of the indictment is granted, such trial to commence within seventy days in accordance with 18 U.S.C. §3161(e), and the date of trial to be fixed by subsequent order of this court.

(2) The United States Attorney shall, within fourteen days, provide to defendant all information known to him readily obtainable through due diligence concerning any cash payments or other benefits provided by law enforcement personnel or cooperating agents to Tom James, Janice Godfrey, or any other person who testified as a witness at defendant's trial. Written records, receipts, and other documentation concerning such payments or benefits must be turned over for inspection. Following the completion of discovery, defendant shall have ten days in which to file any additional motions for new trial, should he desire to do so.

(3) Defendant's motion for new trial on Counts VIII and IX of the indictment shall be considered by the court following the discovery period provided for in (2) above.

SIGNED and ENTERED this 15th day of December, 1980.

_____

Chief Judge